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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No.

PETER H. KLOPFER, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

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Peter H. Klopfer, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the case of *State of North Carolina* v. *Peter Klopfer* on January 14, 1966.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, *infra,* p.p. 12-14, is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966, as printed in Appendix A, *infra,* p. 15. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In a State criminal prosecution, does the State deny to the accused the Constitutional right to a fair and speedy trial by procedurally suspending the prosecution indefinitely over the objection of the accused and without showing any justification for suspending the prosecution indefinitely?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1.) Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2.) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On Monday, February 24, 1964, the Grand Jury for the County of Orange, State of North Carolina returned a Bill of Indictment charging the petitioner, Peter H. Klopfer, with the criminal offense of trespass in violation of N. C. Gen. Stat. 14-134. (R. 5-6.)

Klopfer entered a plea of "Not Guilty" and was placed on trial in the Superior Court of Orange County in March, 1964. The jury could not agree upon a verdict and a mistrial was declared with Klopfer being directed to reappear in court for trial on the following Monday. However, Klopfer's case was not retried at that session of court. (R. 3-4, 6.)

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County, the Solicitor indicated to Klopfer's attorney his intention to have a *nolle prosequi* with leave entered in Klopfer's case. At the April 1965 Criminal Session, Klopfer through his attorney in open court opposed the entry of a *nolle prosequi* with leave. The defendant's contention at that time was that the trespass charge was abated on the authority of *Hamm* v. *City*

of Rock Hill 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964). The Court indicated it approved the entry of a *nolle prosequi* with leave in Klopfer's case. The Solicitor then stated he did not desire to take a *nolle prosequi* with leave in Klopfer's case and would retain the case in its trial docket status. Klopfer's case was continued for the term at that time. (R. 6-7.)

The trial calendar for the August 1965 Criminal Session of Orange County Superior Court did not list Klopfer's case for trial. To ascertain the trial status of Klopfer's case, a motion was filed expressing his desire to have the trespass charge pending against him permanently concluded as soon as reasonably possible. The motion requested the Court to inquire into the trial status of the charge pending against Klopfer and to ascertain when his case would be brought to trial. (R. 7-10.)

The motion filed in Klopfer's case also set forth the grounds for Klopfer's contention that further prosecution of the trespass charge was barred by the retroactive application of the 1964 Federal Civil Rights Act on the authority of *Hamm* v. *City of Rock Hill, supra.* (R. 8-9.)

In response to the foregoing motion, the status of Klopfer's case was considered in open court on Monday, August 9, 1965, at the August 1965 Criminal Session of Orange County Superior Court. The Solicitor then moved the Court that the State be allowed to take a *nolle prosequi* with leave in Klopfer's case. The motion was allowed by the Court. (R. 10.)

How Federal Question Is Presented

The petitioner first invoked the Constitutional right to a fair and speedy trial by his motion that his case be concluded permanently as soon as reasonably possible. (R. 7-10.) The Court's response to the motion was to per-

mit the entry of a *nolle prosequi* with leave, to which the petitioner timely excepted. (R. 10.)

The issue involving the Constitutional right to a fair and speedy trial was brought forward on appeal by the petitioner and decided by the Supreme Court of North Carolina on the basis of the exception and an assignment of error specifically embodying the issue. (R. 10-11.)

The Supreme Court of North Carolina decided the Constitutional issue adversely to the petitioner as follows:

"The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against him in the Superior Court. . . . The reason assigned is that the procedure denies him his constitutional right of a speedy trial."

Appendix A, *infra,* p. 13

"Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi.*"

Appendix A, *infra;* p. 14

REASONS FOR GRANTING THE WRIT

1. The decision of the North Carolina Supreme Court in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) permits the State, by utilization of the procedural device of a *nolle prosequi* with leave, to circumvent the accused's Sixth Amendment guarantee of a speedy trial as made applicable to the State by the Fourteenth Amendment.

In North Carolina the entry of a *nolle prosequi* with leave in a pending criminal prosecution is customarily left

to the initiative and discretion of the Solicitor, subject to the control of the court. *State* v. *Furmage,* 250 N.C. 616, 109 S.E. 2d 563 (1959). The effect of a *nolle prosequi* with leave is to discharge the defendant from his bond and from attending court. The defendant is free to go anywhere he chooses without posting a bond to appear in court at any future time. A *nolle prosequi* with leave is not an acquittal. At any time after the entry of a *nolle prosequi* with leave, the defendant may be indicted again for the same offense or the Solicitor, without the necessity of seeking the court's approval, may have the Clerk issue a capias for the defendant and try him on the original indictment. In effect, a *nolle prosequi* with leave reflects the decision of the Solicitor that he will not "at that time" prosecute the suit further. *Wilkinson* v. *Wilkinson,* 159 N.C. 265, 74 S.E. 740 (1912).

North Carolina Gen. Stat. 15-1 provides for a two-year statute of limitations within which to institute criminal prosecution for a general misdemeanor. The offense of trespass with which Klopfer was charged under N. C. Gen. Stat. 14-134 is a general misdemeanor. The return of a bill of indictment charging a misdemeanor arrests the running of the statute of limitations. Of particular relevance to the *Klopfer* case is the rule in North Carolina that entry of a *nolle prosequi* with leave does not start the statute of limitations to running again. *State* v. *Williams,* 151 N. C. 660, 65 S.E. 908 (1909).

As the decision in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) implies, there is no statute or constitutional provision in North Carolina which requires the Solicitor to ever bring Klopfer's case to trial. Equally apparent in the *Klopfer* decision is the fact that Klopfer has no means under North Carolina law to compel the State to give him his day in court.

The most recent pronouncement of this Court relative to the Sixth Amendment right to a speedy trial is in *United States* v. *Ewell,* .....U. S. ....., 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), in which the scope and purpose of this Constitutional right is stated as follows:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. . . . . this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 198 U. S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950. 'Whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances. . . . The delay must not be purposeful or oppressive', Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L. Ed.2d 393. '[T]he essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L. Ed.2d 1041." *United States* v. *Ewell,* ..... U.S....., 86 S.Ct. 773, 776, 15 L. Ed.2d 627, 630-31 (1966).

Although the *Ewell* case, *supra,* is a federal criminal prosecution, the affirmative safeguards of the Sixth Amendment for an accused have been made applicable to State criminal prosecutions by inclusion in the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963); *Escobedo* v. *Illinois,* 378 U. S. 478, 84 S. Ct. 1758 (1964). The following four factors appear to be

those most relevant to a consideration of whether denial of speedy trial to an accused has been extended beyond that period of time reasonably required by the State for the orderly administration of justice: the length of delay, the reason for the delay, the prejudice to the defendant and waiver by the defendant. *United States* v. *Simmons,* 338 F. 2d 804 (2nd Cir. 1964).

Applying these four factors for determining the infringement of the Sixth Amendment right to a speedy trial to the facts in the *Klopfer* case, it becomes apparent that the State of North Carolina can not claim even one of the four factors. As of August, 1965, when Klopfer's motion requesting trial or dismissal of his case was denied, almost eighteen months had elapsed since his indictment. (R. 5-10). The decision of the Supreme Court of North Carolina in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) permits the delay of Klopfer's trial to continue without limitation. At no point in the proceedings, or record thereof (R. 1-12), has the State of North Carolina ever offered any reason whatsoever for the delay in trying Klopfer's case. At no point in the record of the proceeding (R. 1-12) or in the opinion in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) is there the slightest suggestion that the defendant has in any manner waived his right to a speedy trial. On the contrary, the record discloses clearly that Klopfer affirmatively sought the benefit of his right to a speedy trial in the trial court. (R. 7-10.)

The prejudice to the defendant is quite substantial. He has been put to the burden, anxiety and expense of one trial which ended in a hung jury, and has *not* been afforded another opportunity to exonerate himself. (R. 6-10.) In addition, Klopfer has had stripped from him the protection which the Sixth Amendment right to speedy trial affords against the "anxiety and concern accompanying public

accusation" and the "possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, quoted, *supra.*

Counsel for the petitioner has been unable to discover any other case in the nation, State, or Federal, in which a court takes the position, as the North Carolina Supreme Court did in the *Klopfer* case, that criminal prosecution may be instituted against an accused, and yet the accused may be denied forever his day in court by the arbitrary action of the State and over the objection of the accused. The decision in the *Klopfer* case is clearly erroneous by reason of its blatant repudiation of the speedy trial protection afforded to an accused by the Sixth and Fourteenth Amendments.

2. The petitioner's case is of sufficient importance to justify review of the judgment on its merits for the following reasons:

(a.) The indifference toward the plight of an accused in a criminal prosecution as manifested by the Supreme Court of North Carolina in the *Klopfer* decision (Appendix A, *infra,* p.p. 12-14) is evidence of the persistent and prejudicial indulgences in favor of the State and at the expense of the accused which pervade the administration of criminal justice in state courts, particularly in the South. In the *Klopfer* case, the State's pragmatic concern with the economics of a retrial for Klopfer (Appendix A, *infra,* p. 14) was readily given priority over Klopfer's right to have the opportunity of exoneration. If the proper balance between the State and the accused in state criminal prosecutions is to be maintained, it is imperative that arbitrary denial of an accused's Constitutional rights, as has occurred in the *Klopfer* case, be corrected by this Court.

(b.) The State of North Carolina by the entry of a *nolle prosequi* with leave has subjected the petitioner

to a subtle and indirect, but nevertheless burdensome, form of punishment for an offense as to which the State is barred in all probability from obtaining a conviction. (R. 7-10.) The reputation and standing of the petitioner, a professor of zoology at Duke University (R. 10), is being exposed without recourse on his part to the suspicions and adverse repercussions which are naturally attendant in any community toward anyone charged with a criminal offense. Likewise, the petitioner is afforded no relief from the personal anxiety which naturally continues in response to his being subject to retrial whenever it may suit the State to resume prosecution.

(c.) The utilization of the *nolle prosequi* with leave by the State in cases such as Klopfer's, where the accused has challenged the prevailing opinion of the community (R. 7-10), enables the State to stifle, penalize and discourage the exercise of the First Amendment rights of free speech and free assembly by using minor criminal prosecutions to ensnare the participant into the labyrinth of state criminal prosecution where the participant may be harassed and intimidated into silence or inaction. The State's arbitrary manipulation of criminal procedure to impair and discourage the free exercise of First Amendment rights poses a clear and ominous threat to the democratic process requiring redress by this Court.

CONCLUSION

To make effective the guarantee of an accused's right to a speedy trial under the Sixth and Fourteenth Amendments in a state criminal prosecution, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA IN THE CASE OF STATE v. PETER KLOPFER

1. Opinion of the Supreme Court of North Carolina in the case of STATE v. PETER KLOPFER.

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM, 1965

STATE
v.
PETER KLOPFER
} No. 829 — FROM ORANGE

Appeal by defendant from Johnson, J., August, 1965 Criminal Session, Orange Superior Court.

This criminal prosecution was founded upon a bill of indictment signed by Thomas J. Cooper, Solicitor, and submitted by him to the Grand Jury and returned a true bill by that body at its February, 1964 Session, Orange Superior Court. The indictment charged that on January 3, 1964, the defendant "did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts . . . located on Route 3, Chapel Hill, North Carolina, . . . Watts being then and there in peaceable possession, and the said Peter Klopfer, after being ordered to leave the said premises willfully and unlawfully refused to do so, knowing he . . . had no license therefor . . . etc.".

At the March, 1964 Special Criminal Session, the defendant, represented by counsel of his own selection, entered a plea of not guilty. The issue raised by the indictment

and the plea was submitted to the jury which, after deliberation, was unable to agree as to the defendant's guilt. The court declared a mistrial and ordered the case set for another hearing. Thereafter, the record discloses the following:

"No. 3556 — State v. Peter Klopfer

"The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open court."

T. W. Bruton, Attorney General,
Andrew A. Vanore, Jr., Staff Attorney, for the State
Wade H. Penny, Jr., for defendant appellant.

HIGGINS, J.

The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against him in the Superior Court. Stated another way, he insists his objection takes away from the solicitor and the court the power and authority to enter the order. The reason assigned is that the procedure denies him his constitutional right of a speedy trial.

When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial. "A *nolle prosequi,* in criminal proceedings, is nothing but a declaration on the part of the solicitor that

he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." Wilkinson v. Wilkinson, 159 N. C. 265, 74 S. E. 968; State v. Thurston, 35 N. C. 256. Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is

Affirmed.

The foregoing opinion is located in and may be cited as: STATE v. KLOPFER 266 N. C. 349, 145 S. E. 2d 909 (1966).

2. Judgment of the Supreme Court of North Carolina in the case of STATE v. PETER KLOPFER.

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

STATE		FALL TERM, 1965
vs.	No 829	
PETER KLOPFER		ORANGE COUNTY

This cause came on to be argued upon the transcript of the record from the Superior Court Orange County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Carlisle W. Higgins, Justice, be certified to the said Superior Court, to the intent that the JUDGMENT IS AFFIRMED. And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-three and No/100 dollars ($33.00) and execution issue therefor. Certified to Superior Court this 24th day of January, 1966.

SEAL

ADRIAN J. NEWTON
Clerk of the Supreme Court

By: Kathryn W. Bartholomew,
Deputy Clerk